In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 401

DENNIS MORA, JAMES A. JOHNSON AND DAVID A. SAMAS, PETITIONERS

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE AND STANLEY RESOR, SECRETARY OF THE ARMY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

In June 1966, petitioners, who are privates in the United States Army, received orders from their military superiors to report to the Army Overseas Replacement Station in Oakland, California, preparatory to deployment to Vietnam. Claiming that American participation in the Vietnam conflict is illegal, petitioners brought this action to enjoin the Secre-

tary of Defense and the Secretary of the Army from effecting these orders. The district court dismissed the suit (Pet. App. 24). The court of appeals affirmed (Pet. App. 25), following its affirmance of a similar dismissal in *Luftig* v. *McNamara*, 373 F.2d 664, certiorari denied, June 5, 1967, No. 1326, O.T., 1966. The parties in the instant case had stipulated in the court of appeals that, since the legal issues were the same in both cases, they would be bound by the result in *Luftig* (App., *infra*, pp. 4-5).

In view of the stipulated identity of the two cases, we do not here repeat the considerations against review recited in our Memorandum in Opposition in *Luftig* (No. 1326, O.T., 1966). Suffice it to say that petitioners' belated effort to distinguish their case on the ground that they actually received orders to go to Vietnam while Private Luftig had not (Pet. 8) does not touch the basic reasons for dismissal of their action. This is an unconsented suit against the United States. Since petitioners seek to prevent the Secretary of Defense and the Secretary of the Army from exercising their authority, vested in the Executive by the Constitution, regarding the most effective deployment of members of the armed forces, "the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act'." *Dugan* v. *Rank*, 372 U.S. 609, 620; *Larson* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 704. Moreover, the basic question presented by petitioners—the legality of the American involvement in Vietnam—is a nonjusticiable political question. Petitioners are asking

judicial intervention in the Executive's conduct of foreign policy. As this Court said in *Johnson* v. *Eisentrager*, 339 U.S. 763, 789:

> Certainly it is not the function of the Judiciary to entertain private litigation—even by a citizen—which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad or to any particular region. * * *

See, also *Baker* v. *Carr*, 369 U.S. 186, 211.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1967.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,420

DENNIS MORA, JAMES A. JOHNSON AND DAVID A. SAMAS, APPELLANTS

v.

ROBERT S. MCNAMARA, SECRETARY OF DEFENSE AND STANLEY RESOR, SECRETARY OF THE ARMY, APPELLEES

STIPULATION

The parties hereto, by their attorneys, stipulate and agree as follows:

1. This case seeks a declaratory judgment and injunction, directing the appellees to refrain from deploying appellants to Vietnam or the immediate vicinity thereof. This case is similar to *Luftig* v. *McNamara et al.*, No. 20,129 now in this Court. The appellants herein are relying on the same legal issues presented by the Luftig case.

2. Subject to approval of the Court, this case shall be held in abeyance to abide the result of the United

States Court of Appeals for the District of Columbia Circuit's disposition of the Luftig case.

/s/ SELMA W. SAMOLS
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